

March 5, 2012

Vilma Estrada
PO Box 6417
Laguna Niguel CA 92607-6417

Re: Your Request for Advice
Our File No. I-12-037

Dear Ms. Estrada:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the "Act").¹ Because your question is general in nature, we are treating your request as one for informal assistance.

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other laws that may apply such as Government Code Sections 1090 and 19990, common law conflict of interest, and Public Contract Code Sections 10410 and 10411.

QUESTIONS

1. Does the Act's "permanent ban on switching sides" prohibit you from appearing before your former agency and its auditors regarding tax audits in which you participated as an agency employee?
2. Does the Act's one-year ban prohibit you from appearing before your former agency or its auditors regarding tax audits?

CONCLUSION

1. Yes, if you participated in an audit while working for a state agency, you cannot "switch sides" and work on that same audit in the private sector. The permanent ban does not apply to audits that are "new proceedings," however.
2. No, the one-year ban does not apply to tax audits.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You worked for the Board of Equalization (“BOE”) as both an auditor and a supervising auditor until you accepted a position with a private company in January of 2012. In those positions, you conducted audits, assigned audits to staff, supervised others who conducted audits and reviewed their work, appeared as a BOE representative in appeals hearings, conducted hearings when tax payers disagreed with a result, and participated on the audit selection team. When you left the BOE, you accepted a position with a private firm. You have not offered any information about this firm and your current duties. Based on your facts, we gather you will be assisting your firm in representing clients who have been or will be audited by the BOE.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, colloquially known as the “revolving door” prohibitions. In addition, Section 87407 prohibits certain state and local officials from making, participating in making, or using their official position to influence decisions affecting persons with whom they are negotiating employment, or have any arrangement concerning employment. (*See* Regulation 18747.)

Based on your facts, you have started a position with a private company and have not raised any issues concerning negotiating prospective employment; we are therefore providing information relating to the post-governmental employment restrictions only.

One-Year Ban

The Act prohibits specified officials, for a period of one year after leaving state service, from being paid to communicate with or appear before their former agency for the purpose of influencing administrative or legislative action, or a specified action or proceeding involving a permit, license, grant, contract or the sale of goods or property. Section 87406 specifically provides that no designated employee of a state administrative agency:

“For a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property . . .” (Section 87406(d)(1).)

You have described the work you did while with BOE as various facets of audits and appeals. We must first determine whether tax audits and appeals of those audits are

“administrative or legislative” actions subject to the one-year ban quoted above. Section 82002 defines “administrative action as:

“(a) ‘Administrative action’ means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, Regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding . . .”

Section 82037 defines “legislative action” as:

“‘Legislative action’ means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. ‘Legislative action’ also means the action of the Governor in approving or vetoing any bill.”

We have previously determined that tax audits and appeals of those audits are not “administrative or legislative” actions subject to the one-year ban quoted above. In the *Chan* Advice Letter, No. I-02-084, we concluded that tax audits were a “judicial, quasi-judicial or other proceeding” subject to the permanent ban provisions of Section 87041 and not subject to the one-year ban of Section 87406. Because tax audits and appeals do not qualify as legislative or administrative action (nor the issuance of a permit, license, grant, contract or sale of goods or property), they are not covered by the one-year ban. (See *Rizardo* Advice Letter No. A-09-143.)

Permanent Ban

Sections 87401 and 87402 (collectively, the “permanent ban”) prohibit former state administrative officials from advising or representing any person for compensation in any judicial or other proceeding in which the official participated while in state service. Specifically, Section 87401 provides:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial or quasi-judicial or other proceeding if both of the following apply:

- “(a) The State of California is a party or has a direct and substantial interest.
- “(b) The proceeding is one in which the former state administrative official participated.”

In addition, Section 87402 prohibits former state administrative officials from being paid to “aid, advise, counsel, consult or assist in representing” any other person in any proceeding in which the official would be prohibited from appearing under Section 87401.

As a Supervising Tax Auditor, you were a “state administrative official” for purposes of the permanent ban. (Section 87400(b).) Therefore, the permanent ban restricts your activities in the private sector. Additionally, as a supervisor you are deemed to have participated in any proceeding that was “pending before” (as defined in Regulation 18438.2) your agency and under your “supervisory authority.” (Regulation 18741.1(a)(4).) A proceeding is under a supervisor’s “supervisory authority” if any of the following situations applies to the supervisor:

“(A) The supervisor's duties include the primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted. However, this provision does not apply to a supervisor who is only responsible for the general oversight of the administrative actions or functions of a program in which the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency.

“(B) The supervisor directly supervises the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken.

“(C) The supervisor reviews, discusses, or authorizes any action in the proceeding.

“(D) The supervisor has contact with any of the participants in the proceeding regarding the subject of the proceeding.” (Regulation 187411.1 (a)(4)(A-D).)

The permanent ban only applies to “judicial, quasi-judicial or other proceedings” in which you “personally and substantially” participated at BOE. (Section 87400(d).) A “judicial, quasi-judicial or other proceeding” is “any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency.” (Section 87400(c).) Thus, the permanent ban covers audit proceedings in which you participated, and you would be prohibited from representing any person in connection with an audit in which you participated as an employee of BOE.

The permanent ban does not, however, prohibit you from representing other taxpayers. Nor would the permanent ban prohibit you from representing a taxpayer in a new proceeding, even though that taxpayer may have been a party to a previous proceeding in which you participated. We regard as “new” a proceeding involving different parties, or different factual or legal issues from those considered in previous proceedings. For example, in the *Rizardo* Advice letter (*supra*), we advised that the permanent ban applies throughout the duration of any audit proceeding in which an Associate Tax Auditor at the Employment Development Department participated. It did not, however, prohibit the auditor from representing a taxpayer in any new

proceeding, even though that taxpayer may have been a party to a previous proceeding in which the auditor participated. (*See Gonzalez* Advice Letter, No. I-10-090.)

Please note that regarding your specific question of whether you can represent a client in a proceeding involving a different tax year, the Act would consider this a new proceeding, to which the permanent ban would not apply.

In other cases, what constitutes the same or different “proceeding” for purposes of these restrictions must be analyzed on a case-by-case basis. We cannot provide you with more detail on this question until there is a specific proceeding to analyze.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl